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IN THE

SUPREME COURT OF PENNSYLVANIA,

FOR THE

EASTERN DISTRICT.

HENRY J. WILLIAMS, Appellant,

vs.

THE LIBRARY COMPANY OF PHILADELPHIA, Appellees.

BRIEF SUBMITTED ON BEHALF OF APPELLANT

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of Counsel for Appellant.

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In Re the Appeal of Henry J. Williams.

SUPPLEMENTAL BRIEF IN BEHALF OF APPELLANT.

Mr. Williams, duly qualified as executor of Dr. Rush's will, was proceeding to execute it according to its very terms when arrested by the injunction of a Court of Equity.

The Legislature have placed testamentary trusts under the special supervision of the Orphans' Court by several acts of Assembly subsequent to those conferring equity powers in general upon our courts. (See Purdon 308.)

If Mr. Williams was neglecting or mismanaging the trusts committed to him, the remedy of any injured party was in the Orphans' Court, and because specially lodged there, it cannot be sought elsewhere.(*a*)

But no delinquency and no mismanagement have been alleged. The jurisdiction of the Orphans' Court, necessarily exclusive in the premises, has not been invoked, because no party has appeared to complain against Mr. Williams.

The Library Company of Philadelphia, a legatee in the will of Dr. Rush, having only a remote and contingent interest in his estate, is the party that passes by the Orphans' Court and goes into the Supreme Court upon its equity side to complain of the site which Mr. Williams had selected for the library building which the will enjoined him to erect.

The gravamen of the complaint against the site is to be found in the XXth section of the bill, and it is, that it would be inconvenient to both the directors and the share-

(*a*) Chew *v.* Chew, 4 Casey 17.

holders—"*not less than half a mile south of their usual places of resort*," and, worse still, "*more than a mile out of the line of travel of the large majority using, or entitled to use the library.*"

The inconvenience of having to go from half a mile to a mile out of the beaten track of their lives to obtain the knowledge purchased for them by the munificence of the testator, is the wrong and injury of which the plaintiffs complain. The executor should have employed the testator's wealth to bring this knowledge home to the plaintiffs, or to have scattered it along their frequented paths. It is for this the ear of a court of equity is vexed—for this the statutes and the Orphans' Court are ignored—for this it is to be referred to a Master to inquire and report what would be a fit and proper location for the building, for this the select and faithful executor of the will is to be restrained by injunction "preliminary until the hearing, and perpetual thereafter," from executing the will.

On the face of this extraordinary bill two things are admitted, one a matter of fact, the other a matter of law.

1st. It is admitted that the selection of a site is committed to the discretion of the executor—the language of the will is (2d clause of the 2d codicil), "I authorize and allow my executor, under a broad and thoughtful foresight, to increase the size of the lot, *and select any situation he may deem most expedient*, without regard to any provision of my will or codicils."

"He may deem expedient." Who? Henry J. Williams. Whatever lot Henry J. Williams may deem most expedient, shall be the site of the library building. Such is the will. The plaintiffs admit that this committed the selection to Mr. Williams' discretion.

2d. The conclusion of law which the plaintiffs admit is, "that a court of equity will not interfere with a trustee in the exercise of a discretionary power save to see that a discretion is really exercised."

In the books the rule is stated more strongly, but when we take the two admissions, even as stated by the plaintiffs, it is difficult to see why they should be in a court of equity praying for a Master to select a site under the supervision of the court.

The will is the law of this estate. The intention of the testator is the pole star to guide the court in the construction and administration of the will. If Dr. Rush's estate is not to be treated as derelict, a waif to be grabbed by the first finder, if it is entitled to the protection of law, then the law must be applied according to the will, and that commits the selection of a site not to the discretion of this learned court, nor to any of its masters, but solely and exclusively to the discretion of Henry J. Williams.

So obvious is it that, upon the will and the law which belongs to the will, the plaintiffs have no case for a court of equity, they find themselves obliged to go outside and look up some exterior fact on which to build their exceedingly artificial edifice. They fancy they have found it in a circumstance which Mr. Williams has never attempted to conceal, but which, with indiscreet frankness, he has avowed and admitted again and again, verbally and in writing, to wit, that he purchased this lot for Dr. Rush before his death and by his express direction, and promised him eight days before his death that the Library building should be erected on this lot.

As this is the sole foundation of the plaintiffs' bill, I beg your Honor's attention to the following observations upon it.

1. It is an "exterior" fact. This is the very word one of the learned counsel applied to it in the argument at Nisi Prius. It does not arise out of the will, but it is brought in by parol evidence to defeat a main purpose of the will. No sane man will doubt that Dr. Rush intended

that Henry J. Williams should execute his will. And this intention dates from his death, for it was then the will took effect. But the testator knew perfectly what Mr. Williams had promised him. Still he altered not his will. Notwithstanding the promise, Dr. Rush's will was and is, that Henry J. Williams, with the pledge upon him, should be his executor. The plaintiffs seek to defeat this plain intention of the will by parol evidence of an irrelevant and "exterior" fact.

2. The promise was an imperfect obligation—a mere *nudum pactum*—and belongs to that class of consoling assurances which are so frequently given to dying persons by the friends who surround the death bed. Dying persons often exact promises as to where they shall be buried, what ceremonies shall attend the funeral, how the household shall be managed, and various other details, which, being found impracticable, are varied or neglected altogether. Courts of justice disregard such verbal promises, not from insensibility to what is due to the dead, but because they are not of a nature to control the due administration of the decedent's estate according to law. The promise complained of here is of the same quality. Had it conflicted with his duties and oath as executor, Mr. Williams tells you he would have renounced the trust; and nobody has any right to question his assertion, because he is admitted to be an honest man, and an omniscient eye alone is capable of reading his motives, thoughts, and intents better than himself. As there was nothing disabling in the nature of this promise, the uncontradicted proof is that in point of fact, it did not influence his discretion as executor.

3. But the complaint is, not that this unimportant promise was made—indeed Mr. Williams is commended for so comforting the dying man—but the plaintiffs complain that they were entitled to a sound and unbiased judgment in the selection of a site, and that the promise warped or had a manifest tendency to warp the defendant's discretion. On

pages 20 *et seq.* of the bill, this theory is set forth with abundant verbiage, but it is all founded upon a false assumption, *that they, the plaintiffs, were entitled to any higher or better discretion than such as Mr. Williams possessed.*

Whatever rights the plaintiffs originally had (I shall hereafter maintain that they have forfeited all they had), they held them under and according to the will. They were contingent legatees, and if they took any part of Dr. Rush's estate, they must take it in *formam doni;* they must take it at the hands of Mr. Williams, or in case of his disability, at the hands of Mr. Biddle or Mr. Craven. No other way had been provided for them—no otherwise were they legatees, or interested in the estate. The suggestion that Mr. Williams was not unbiased is a sheer impertinence. Biased or unbiased, free or trammelled, he was the appointed agent by which the plaintiffs were to get their legacy. It was as irrelevant to allege that his judgment was trammelled as it would have been to allege that his head was gray. Dr. Rush knew who he was, and what he was, and he selected him as his agent, his personal representative, to dispense his bounty, and if his ungrateful legatees don't like the hand that was chosen, let them refuse the gift and cease carping at the giver and his agent.

Both the master and the learned judge at Nisi Prius conceded to the plaintiffs more than they had a right to claim, as to the freedom of the will of Mr. Williams. The will of Dr. Rush speaks of a broad and thoughtful foresight in his executor, but it imposes no such rule as the plaintiffs claim. Not a word in this fundamental law gives the plaintiffs the right to a free, unbiased, unwarped judgment in the selection of site, but what it does give them is the discretion of Henry J. Williams. Their whole case, therefore, rests upon a gratuitous assumption, outside of the will and subversive of all its provisions.

And their analogies are no better. A man shall not be a judge or juror in his own case, because no law has said

he should be. But if I give a legacy by my will, where is the law that requires me to appoint a disinterested executor to pay it to the legatees? Frequently, very generally indeed, executors are interested parties, biased and warped by self-interest, but whoever before heard of a *legatee* objecting to his legacy on this ground? In this case it happens that the executor is free, untrammelled, and unwarped, which makes the complaint the more unreasonable, but if it were not as baseless as the fabric of a dream, if Mr. Williams were indeed subjugated by his promise to Dr. Rush, still in this case the law is that *he* shall execute the trusts of the will.

Equally inapplicable is the doctrine of the Duke of Portland's case. That was a case of settlement under peculiar circumstances, and the two attempts to execute the power were held void because the donee did not act upon his own discretion, but confessed himself a mere dummy. The Lord Chancellor said a valid appointment might have been made of the fund, but such as was made was held to be a fraud upon the power. What has the reasoning upon such a case to do with a will to be executed under the superintendence of our Orphans' Court, by an executor duly empowered to act, and actually proceeding as fast as he can to execute the will? I confess it is hard to trace an analogy that is so remote and attenuated.

These are the instances, set up by way of authority, to support the theory of the bill, and it is significant that they are so few and so inconclusive. Against them, such as thay are, I oppose the plain text of the will, and planting myself on that solid ground, I say that the discretion and judgment necessary to select a site for the library building must be exercised by Henry J. Williams or Alexander Biddle or Thomas Craven, or else Dr. Rush's will must be overthrown, and his heirs-at-law be admitted to the inheritance of his estate.

The 28th clause of the codicil of 16 May, 1866, and the 5th clause of the codicil of 18 April, 1867, contemplate the

possibility of Mr. Williams being unable to execute the will. These clauses were not indeed drawn with a view to what has happened, for no good angel who may have watched over Dr. Rush in his last hours could ever have anticipated such a case as this, but the will is to be construed by its four corners, and the intention of the testator is the rule for the court. So reading the will, can it be doubted that the testator intended to commit the selection of a site to one or the other of the above-named three men? He would be a bold man who would deny this.

But if such is the will, whence comes the power of a Master? Equity has jurisdiction of trusts, but only to execute them according to their institution. Courts of Chancery have no more power to repeal wills, or make wills for dead men, or substitute for their wills the fancies and conceits of lawyers, whom much learning has made mad, than Orphans' Courts have. Until it becomes unlawful for men to make wills, it will be unlawful for courts of justice to disregard and overthrow them. Dr. Rush did not appoint this court, nor any Master of this court, to execute his will. The prayer for a Master then is a gross aggression upon the will, which surely this court will be slow to tolerate.

And this brings me to an observation which failed to make any impression upon the Judge at Nisi Prius (doubtless through defectiveness of the statement), but which I venture to repeat—that this bill and its prayers are founded upon a denial of the *jus disponendi*, which I submit is the essential and main quality of property. The great motive for acquiring and guarding property is that we may dispose of it. Very little of it can we use—very little satisfies all our present wants, but the right to dispose of it when we are done with it is a most animating and invaluable right. It is at that right the plaintiffs strike. Their rights under the will were future and contingent—future because until the building was erected and tendered to them they were to have no voice in the matter, and contingent

because when the building should be tendered they might decline it, and then it was to become the Ridgway Library.

Now in such circumstances what haste was ever more indecent than the rush to Harrisburg to get from a pliant legislature the scandalous act of Assembly of 25th February, 1870? An act which virtually repeals Dr. Rush's will and authorizes such judicial changes of the plaintiffs' charter as may be necessary to "carry into effect the conditions and provisions of the said will and codicils *in accordance with the directions of this act.*"

Then came the resolution of 10 Dec. 1870, notifying Mr. Williams that the Company is now ready to undertake the performance of their duties as trustees of the Ridgway branch of the Library. "*Now ready,*" before a spade is put into the ground—before the plan of building is drawn upon paper—they were now ready to undertake the performance of "*their duties.*" Pray, gentlemen, when, where, how had it become your duty to execute Dr. Rush's will? If this was not a piece of most ridiculous superserviceableness, it was worse, for it was a deliberate and malicious assault upon Dr. Rush's rights of property.

I pass by all the little acts of unkindness and petty annoyances to which these people subjected Mr. Williams, to say that this attempt to overthrow the will of their benefactor, culminating in this injunction suit, brings the plaintiffs within the spirit and purview of the 25th section of the 1st codicil. The words of that clause, "the said Library Company," originally intended for the plaintiffs, whom Dr. Rush trusted too confidingly, may be construed to mean the Ridgway Library, and then the plaintiffs have brought themselves, by their ill conduct, under the malediction of that clause. In other words, they have forfeited, by their persistent opposition to the will, all rights under it, and, happen what may, no part of Dr. Rush's estate ought, and I believe no part ever will go into their coffers.

GEORGE W. WOODWARD,

of Counsel for Appellant.